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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PUBLIC SERVICE COMPANY OF COLORADO
and R. M. RICHARDS,
Petitioners,

v.

WILLARD A. THOMPSON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are statements made by an employer to an employee in disciplinary letters which are required by past practice pursuant to a collective bargaining agreement absolutely privileged for the reason that any state law claim of defamation is pre-empted by federal labor policy?

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Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, Public Service Company of Colorado and R. M. Richards, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Colorado entered in this proceeding on October 22, 1990.

OPINIONS BELOW

The Opinion of the Supreme Court of Colorado is reported at 800 P.2d 1299 (Colo. 1990) and appears in Appendix A hereto at pp. 1a-18a. The Decision of Division III of the Colorado Court of Appeals is reported at 773 P.2d 1103 (Colo.App. 1988) and appears in Appendix B hereto at pp. 19a-27a. The Order of the District Court, City and County of Denver, was unreported and appears in Appendix C hereto at pp. 28a-29a.

JURISDICTION

The judgment of the Supreme Court of the State of Colorado was entered on October 22, 1990. This Petition for Certiorari is being filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§ 171. Declaration of purpose and policy

It is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

§ 185(a). Venue, amount and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

This case arose out of two disciplinary letters given to Respondent by his supervisor, Petitioner, Mark Richards. The first involved a situation where Respondent was disciplined as a result of his conduct at a building owned by the State of Colorado, a customer of Petitioner Public

Service Company of Colorado.[1] As a result of Respondent's conduct, he was suspended for five days and given a letter of suspension charging him with sexually harassing some of the employees of the State of Colorado. Respondent, being a member of International Brotherhood of Electrical Workers, Local No. 111, filed a grievance under the Public Service Company I.B.E.W. Local No. 111 Collective Bargaining Agreement (hereinafter "Collective Bargaining Agreement") to challenge the suspension. At the second step of the grievance procedure mandated by the Collective Bargaining Agreement, Public Service, the Union and Respondent all agreed to settle the matter by reducing the suspension from five days to two days. Additionally, Respondent agreed to go to counseling and the word "sexual" was removed from the letter of suspension.

The second letter was a written reprimand issued several months later. Respondent had been placed on "evidence of illness" which, pursuant to the terms of the Collective Bargaining Agreement, required him to provide a doctor's certificate before he was allowed to claim sick time on his time card. Respondent nevertheless claimed sick time on his time card without a doctor's certificate. As a result, his supervisor, Mr. Richards, disciplined Respondent for falsifying his time card by claiming sick time. Respondent presented his grievance of this letter directly to his third level supervisor as he was entitled to do pursuant to Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a). The third level supervisor voided the written reprimand and issued another written reprimand to Respondent stating that Respondent's entry on his time card indicated ignor-

[1] Subsidiaries of Public Service Company of Colorado which are not wholly-owned subsidiaries are Aquafarm Associates of Colorado, Inc., Natural Fuels Corporation, Fisher Ditch Company, United Water Company, The Hillcrest Ditch and Reservoir Company, The East Boulder Ditch Company, Las Animas Consolidated Canal Company, and The Consolidated Extension Canal Company. (Rule 29.1)

ance of the required policy/procedures and malingering. This revised written reprimand was not challenged by Respondent. Both letters were sent to Respondent's Union representative pursuant to past practice agreed to by the parties that all disciplinary notices be in writing and be sent to the Union.[2]

Then, several months later, Respondent brought suit against his supervisor, Mark Richards, and Public Service Company of Colorado, Petitioners here, alleging that the contents of the letters of suspension and written reprimand were libelous.

On October 14, 1986, Petitioners filed a Motion for Summary Judgment before the Trial Court arguing, among other things, that the contents of the disciplinary letters were absolutely privileged, and therefore the case should be dismissed, inasmuch as any claim of defamation by an employee covered by a collective bargaining agreement relating to statements made in disciplinary proceedings was pre-empted by federal labor law. (Appendix D at pp. 30a-31a). The Trial Court did not rule on Petitioner's federal claims, but did grant the Motion for Summary Judgment based upon state law considerations. (Appendix C at pp. 28a-29a).

The Court of Appeals for the State of Colorado affirmed the Trial Court's decision but on the alternate federal grounds. The Court of Appeals determined that the statements in the disciplinary letters were absolutely privileged under federal labor law, following *General Motors Corp. v. Mendicki*, 367 F.2d 66 (10th Cir. 1966),

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[2] Pursuant to Article 30 of the Collective Bargaining Agreement between the I.B.E.W. and Public Service Company, the parties agreed that any and all practices mutually agreed to and accepted by the parties shall continue unless changed pursuant to the provisions of the Agreement. Disciplinary actions were required by past practice to be in writing and mailed to the Union thus making this requirement a part of the Collective Bargaining Agreement through Article 30.

and *Hasten v. Phillips Petroleum Co.*, 640 F.2d 274 (10th Cir. 1981). (Appendix B at p. 23a).

The Supreme Court of Colorado reversed the decision of the Court of Appeals, determining that statements made in disciplinary letters and grievance proceedings were not absolutely privileged, but were only subject to a qualified privilege. Since Respondent had alleged in his pleadings that the statements were made with malice, the Supreme Court determined that a genuine issue of fact remained and remanded the matter for trial. (Appendix A at p. 18a).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Raises Significant And Recurring Problems Concerning The Ability Of Supervisors To Truthfully And Forcefully Communicate With Their Employees And Union Representatives Without Fear Of Personal Liability For Statements Made In Disciplinary Letters And Grievance Proceedings.

In the history of American jurisprudence, notice of the offense with which one is charged is an essential element of fairness. U.S. Const. amend. VI. Individuals need to know what charges are brought against them so that they can appropriately and fully respond to them. *Id.; Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970).

The same is true in the employment context. When an employee is charged with committing an offense against his employer, an essential element of fairness is that the employee know of the misconduct charged so that he can respond to the charge and challenge it if appropriate. Elkouri and Elkouri, *How Arbitration Works*, 673-674 (4th ed. 1985).

The process through which an employee is informed of offenses committed against his employer is either by oral communication from his or her supervisor or through written notice. Written notices are the more ap-

propriate vehicle for counseling, warning and communicating with an employee inasmuch as the direction and instruction contained in the written notice lessen the possibility of misunderstanding among the parties and increase the degree of industrial due process that a disciplined employee is accorded. (Appendix B at p. 26a).

The decision of the Colorado Supreme Court being challenged here subjects supervisors to potential individual liability and debilitating trials for statements made in the course of their duties and pursuant to the requirements of collective bargaining agreements that they provide written disciplinary notices to employees and attend and participate in grievance adjustment sessions. The decision of the Colorado Supreme Court chills the ability of the Company and the Union to deal with each other to resolve problems in the workplace because under the decision, supervisors and employers in general will be reluctant to vigorously and fully state what the problem is for fear of being required to defend the statements in lengthy and costly litigation.

Also, employers will be less likely to resolve grievances or to accommodate employees in the adjustment of disciplinary notices, for such adjustment or compromise might provide an evidentiary basis for the employee to argue in a defamation action that the accommodation by the employer in changing the disciplinary notice shows that the initial notice was untrue.

A stated purpose of the Labor Management Relations Act of 1947, 29 U.S.C. § 171(a), is to promote industrial peace by the settlement of issues between employers and employees through the process of conference and collective bargaining between employers and the representatives of their employees. The Act also provides that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining

agreement." 29 U.S.C. § 173(d). The grievance machinery created by the collective bargaining system is at the very heart of the system of industrial self-government, and the grievance procedure is a part of the continuous collective bargaining process. *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

This Court determined in *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), that Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, authorized federal courts to fashion a body of federal law common throughout the country. In *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962), this Court determined:

> The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of the process strikes at the very core of federal labor policy.

What the Colorado Supreme Court has done in this case is to inhibit and discourage the free flow of information through disciplinary letters required by the Collective Bargaining Agreement. As a result, the decision of the Colorado Supreme Court inhibits the free flow of information from supervisors to employees and their union representatives such that matters in the workplace can not be easily resolved. This outcome is contrary to federal labor policy.

The facts of this case provide a perfect example. One of the instances which gave rise to Respondent's claim of libel was a disciplinary letter of suspension for sexual harassment. The suspension was for five days. This matter was processed through the grievance procedure in a grievance filed by Respondent. (Appendix A at p. 4a). At the second step of the grievance procedure, the

matter was resolved by removing the offending word, "sexual," reducing the suspension from five days to two days, and requiring Respondent to receive counseling. (Appendix B at pp. 21a-22a). Under the new rule of law created by the Colorado Supreme Court, such a settlement would be very difficult since both the Company and supervisor would be required to be vigilant for the subsequent litigation which may be on the horizon.

Similar circumstances surround Respondent's second claim of libel, which resulted from a written warning stating that Respondent had falsified his time card. As a result of an appeal by Respondent directly to his third level supervisor, as allowed under 29 U.S.C. § 159(a), that supervisor voided the original written warning, but gave him another more acceptable warning, which found Respondent guilty of malingering. Again, such a resolution would not be likely where the supervisor would know that the change in the original warning would be evidentiary fodder for the employee in a subsequent defamation case. This is exactly what happened here. Respondent waited until these matters had been resolved amiably through the grievance process with the Respondent's union and the Respondent, and only then filed a defamation action seeking damages against his immediate supervisor and his employer.

In its decision, the Colorado Supreme Court provides only qualified immunity for those supervisors who are required by a collective bargaining agreement to issue written letters of disciplinary action. Therefore, in Colorado, they are entitled to immunity as long as the statements are shown not to have been made with actual malice. This, however, is of little comfort to any supervisor who is required to go to trial since inevitably the question of actual malice is one of fact which cannot be resolved by summary judgment. *Cf.*, Appendix A at pp. 15a-18a; *Krasinski v. United Parcel Service, Inc.*, 124 Ill.2d 483, 530 N.E.2d 468 (1988). It is not only the potential for personal liability but the process of going

through trial that chills the full and free discussion of views among employers, employees and unions. It is this impediment to the free flow of information in disciplinary letters and grievance proceedings that violates federal labor policy here.

The Supreme Court of Colorado spent a great deal of time determining that the case under review was not pre-empted under *Lingle v. Norge Division*, 486 U.S. 399 (1988). In *Lingle*, this Court determined that Section 301 pre-empts the application of state law in an action if such action requires the interpretation of the terms of the collective bargaining agreement. *Lingle* involved an employee who filed suit claiming retaliatory discharge because she had allegedly been fired for attempting to secure workers compensation benefits. Lingle was covered by a collective bargaining agreement which provided relief if she was discharged without just cause. The Court concluded that the state claim of retaliatory discharge would not be pre-empted merely because both proceedings would require the analysis of the same facts. *Id.* at 409-419.

However, this Court did not have an opportunity in *Lingle* to review a case such as presented here where the state claim, while not necessarily requiring the interpretation of the terms of the Collective Bargaining Agreement, nevertheless interferes with the discipline and grievance process arising out of the Collective Bargaining Agreement. *Cf., United Steelworkers v. Rawson*, —— U.S. ——, 110 S.Ct. 1904 (1990). In the case under review, federal labor policy would still require pre-emption of this cause of action because allowing the state defamation action to proceed would interfere with the discipline, grievance and arbitration process established in the Collective Bargaining Agreement. Therefore, while the Supreme Court of Colorado may have correctly applied the *Lingle* analysis in that the determination of Respondent's defamation claims may not require an interpretation of the Collective Bargaining

Agreement (Appendix A at pp. 6a-13a, Part B), it was wrong in Part C of its opinion (Appendix A at pp. 13a-15a) when it concluded that Respondent's claims were not pre-empted as a result of the interference with federal labor policy. This requires reversal of the Colorado Supreme Court decision.

Federal labor policy favors the peaceful resolution of labor grievances through conferences and bargaining processes. 29 U.S.C. § 171(a). *See, Mendicki*, 367 F.2d at 70; *Joftes v. Kaufman*, 324 F.Supp. 660, 663 (D.D.C. 1971). In light of the overriding policy to encourage, facilitate and effectuate the settlement of issues between employers and employees, an unqualified and absolute privilege should clearly be available with respect to all oral and written statements made in the course of grievance meetings and in disciplinary notices. *Hasten*, 640 F.2d at 278-279.

There is a fundamental distinction between pre-emption of state claims which interfere with the process of resolution of grievances and arbitrations and pre-emption of claims which may arise requiring interpretation of the terms of collective bargaining agreements. The Colorado Supreme Court has not recognized this distinction. What could interfere more with the process of coming to a full and fair resolution of matters brought to the attention of employers and ultimately processed through a grievance procedure than a state cause of action which forces all but the unwary to hold back as much as possible, settle as little as possible, and preserve their rights for developing evidence for the potential state court defamation litigation?

This Court in *Lingle* quoted its statement in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219 (1985) that:

> [t]he need to preserve the effectiveness of arbitration is one of the central reasons that underlay the Court's holding in *Lucas Flour*.

Lingle v. Norge, 486 U.S. at 411.

The effectiveness of arbitration will surely be diminished if there cannot be a full and fair disclosure of even the cause of the discipline which brings the employer, the employee and the union together to resolve the matter.

Additionally, this case is analogous to *United Steelworkers v. Rawson*, —— U.S. ——, 110 S.Ct. 1904 (1990). In that case, this Court determined that even though Rawson's tort claims could potentially be determined without interpretation of the provisions of the collective bargaining agreement, the claims could not be described as independent of the collective bargaining agreement since the duty the union assumed arose out of the agreement. Therefore, Rawson's tort claims were pre-empted under Section 301.

In this situation as well, the duties of the employer and its supervisors concerning the grievance procedure and issuing disciplinary notices arose out of the Collective Bargaining Agreement through its terms and past practice. Therefore, any defamation claims relating to those disciplinary notices or to statements made during grievance meetings cannot be described as independent of the Collective Bargaining Agreement, and they should be pre-empted under Section 301 as well.

Finally, the case of *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), holding that the National Labor Relations Act does not bar a civil action for libel under state law where defamatory statements were published during a union organizing campaign by the union and its officers, is not controlling. In *Linn*, exclusive jurisdiction was unsuccessfully sought on the basis of statements arguably made during the course of what the law forbids or discourages, an unfair labor practice. While the N.L.R.B. has jurisdiction over claims of unfair labor practice, there is no federal policy reason to shield the alleged libeler from an action seeking damages for a libel made during the course of an unfair labor practice. Here, statements made in grievance proceedings and dis-

ciplinary letters rather than being discouraged by federal law, are encouraged by federal law; federal policy being to encourage the peaceful disposition of grievance issues. 29 U.S.C. § 171(a). While the libelous statements considered in *Linn*, and the context in which they were uttered, constituted conduct which was merely a "peripheral concern" of the N.L.R.B., the circumstances giving rise to the action at bar involve interests which necessarily require the uniform employment of federal law in order to prevent the impairment of national labor policy. *Brooks v. Solomon Co.*, 542 F.Supp. 1229, 1233-1234 (N.D.Ala. 1982).

An additional rationale in this Court's decision in *Linn* was that the remedial provisions of labor law offered no possibility of relief for the injury allegedly suffered by the official involved. *Linn*, 383 U.S. at 63; *see also, Joftes v. Kaufman*, 324 F.Supp. 660, 664 (D.D.C. 1971). Here, on the other hand, Respondent had available to him an opportunity through the grievance procedure to secure personal relief and vindication. To allow him to proceed instead by way of a burdensome, expensive and vexatious libel suit against individuals who did no more than fulfill their duty to inform him of the reasons for his discipline would indeed be subversion of the carefully constructed system of procedures and remedies for employment disputes. *Joftes v. Kaufman*, 324 F.Supp. at 664.

Therefore, while under *Lingle* a claim will not be pre-empted when it is not necessary to interpret the terms of the labor agreement, it should be pre-empted when the duty to act arises out of that collective bargaining agreement as in *Rawson*. Also, defamation claims should be pre-empted when they interfere with the disciplinary, grievance or arbitration processes provided for in those collective bargaining agreements. Such defamation claims in those circumstances interfere with the national labor policy to provide for a quick, efficient and orderly resolu-

tion of employee labor disputes and therefore should be pre-empted under federal labor policy.

The decision of the Supreme Court of Colorado interferes with that uniform federal labor policy, because under it, a supervisor is not free to speak his or her mind or tell the employee what charge he or she is facing without fear of personal liability, while supervisors in other states are free to continue the full free flow of information between employer, employee and union. Because this is a recurring issue, the Court should review this matter to establish a uniform federal policy for determining the pre-emption of defamation claims arising out of the disciplinary, grievance and arbitration process.

II. The Decision Below Raises A Conflict Between The Colorado Supreme Court, The Tenth And The Ninth Circuit Courts Of Appeals, The Supreme Court Of Alabama, The Supreme Court Of Michigan And The Supreme Court Of Nebraska.

As stated in *Textile Workers v. Lincoln Mills*, 353 U.S. at 451, the Labor Management Relations Act authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements. The underlying principle of this rule is that federal labor policy emanating from the Labor Management Relations Act should be applied in Colorado as it is in New York or California.

The case law cited in the decision of the Colorado Supreme Court itself clearly demonstrates that whether a statement made during the discipline or grievance process is absolutely or only qualifiedly privileged is subject to the whim of geography or jurisdiction. The most striking example of this is the conflicting decisions within the 10th Circuit, of which Colorado is a part. The Colorado Supreme Court determined that:

> [A] state law defamation action based upon statements made in a grievance or disciplinary proceeding

> may go forward when the state law recognizes a qualified privilege for communications made in the course of the disciplinary or grievance proceedings.

(Appendix A at p. 15a)

In *Mendicki*, 367 F.2d 66, the Tenth Circuit held that statements made during the grievance process and grievance proceedings were absolutely privileged. *In Hasten*, 640 F.2d 274, the Tenth Circuit concluded that disciplinary notices were also absolutely privilged under federal labor policy. In the instant case, the Colorado Supreme Court determined that the Tenth Circuit's decisions in *Hasten* and *Mendicki* are in error on a question of federal law. As such, should a defendant be lucky enough to have diverse citizenship (28 U.S.C. § 1332) or be able to remove the case to federal court and pursuant to *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), avoid artful pleading, the decision of the Tenth Circuit would be that such disciplinary letters would be absolutely privileged. However, a defendant not so fortunate as to be able to gain the federal forum in Colorado would only have a qualified privilege if the decision of the Colorado Supreme Court is allowed to stand.

There is also a substantial split of authority throughout the rest of the country. In the case of *Hyles v. Mensing*, 849 F.2d 1213, 1217 (9th Cir. 1988), the Ninth Circuit held statements made during grievance proceedings to be absolutely privileged. Similarly, in the case of *Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057, 1063 (9th Cir. 1989), the Ninth Circuit, while expressly reserving ruling on whether to adopt the *Hasten* rationale, held that when a collective bargaining agreement requires employers to notify employees and the union in writing of intended discipline, any claim based upon the discharge notification is therefore inextricably intertwined with the collective bargaining agreement and is pre-empted.[3]

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[3] In an Eighth Circuit case, *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620 (8th Cir. 1989), a libel claim based upon accusations by

In *Nelson v. Lapeyrouse Grain Corp.*, 534 So.2d 1085 (Ala. 1988), the Alabama Supreme Court determined that testimony given during grievance proceedings was absolutely privileged.[4] The Supreme Court of Michigan has determined that accusations of dishonestly made at the time of a suspension prior to discharge are absolutely privileged. *Fulghum v. United Parcel Service, Inc.*, 424 Mich. 89, 378 N.W.2d 472 (1985). In *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985), the Supreme Court of Nebraska, following *Mendicki*, determined that statements made in a Railway Labor Act proceeding are absolutely privileged.[5]

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employees that an individual slashed tires was determined to be pre-empted by Section 301, 29 U.S.C. § 185, inasmuch as the judicial resolution of the libel allegation would necessarily involve the interpretation of the collective bargaining agreement to determine whether the plaintiff was wrongfully discharged.

[4] However, while the Supreme Court of Alabama recognized one part of the absolute privilege doctrine when it held that statements made during grievance proceedings are absolutely privileged, it also has held that oral statements and telegrams notifying an individual of suspension and then ultimate termination are subject to only a qualified privileged. *Reynolds Metals Co. v. Mays*, 547 So.2d 518 (Ala. 1989).

[5] In addition to these decisions of the federal Courts of Appeals and Supreme Courts of several states, lower courts have also determined for various reasons that statements made during grievance proceedings and disciplinary proceedings are absolutely privileged. *See, Hull v. Central Transport, Inc.*, 628 F.Supp. 784 (N.D.Ind. 1986) (statements made during grievance proceedings are absolutely privileged); *Seid v. Pacific Bell, Inc.*, 635 F.Supp. 906 (S.D.Cal. 1985) (Section 301 pre-empts claim for defamation based on statements made in an investigation pursuant to the collective bargaining agreement); *Green v. Hughes Aircraft Co.*, 630 F.Supp. 423 (S.D. Cal. 1985) (statements uttered within the context of an initial report and investigation are absolutely privileged); *Brooks v. Soloman Co.*, 542 F.Supp. 1229 (N.D.Ala. 1982) (statements made during grievance proceedings were absolutely privileged); *Honaker v. Florida Power & Light*, 95 LRRM 3265 (M.D.Fla. 1977) (statements made in an informal meeting which preceded the filing of a formal written grievance are absolutely privileged); *Macy v. Trans*

On the other side of the issue, in addition to the Colorado Supreme Court, there are a minority of jurisdictions which would hold that statements made during grievance proceedings or in disciplinary letters have only a qualified privilege.[6]

As is clear by the extreme divergence of authority cited above, this case provides an excellent opportunity to settle once and for all what the law should be concerning preemption of defamation claims arising out of the disciplinary and grievance process envisioned in collective bargaining agreements. Due to the requirement to have a uniform federal labor policy, the Court should take this opportunity to review this case and resolve these conflicts.

World Airlines, Inc., 381 F.Supp. 142, 148 (D.Md. 1974) (statements and written communications made to an employee concerning discharge as a result of grievance proceedings are absolutely privileged under the Railway Labor Act); *Joftes v. Kaufman*, 324 F.Supp. 660 (D.D.C. 1971) (statements made providing reasons for dismissal are absolutely privileged inasmuch as by being a member of the bargaining unit, one consents to such notices); *Louisville & Nashville R.R. Co. v. Marshall*, 586 S.W.2d 274 (Ky.Ct.App. 1979) (letter concerning work and probationary period under the collective bargaining agreement is absolutely privileged); *Rougeau v. Firestone Tire & Rubber Co.*, 274 So.2d 454 (La.App. 1973) (statements made during an investigation are absolutely privileged); *Turner v. Gateway Transportation Co.*, 569 S.W.2d 358 (Mo.App. 1978) (disciplinary letter sent to union council was consented to by plaintiff and therefore absolutely privileged); *Agriss v. Roadway Express, Inc.*, 334 Pa.Super. 295, 483 A.2d 456 (Pa.Super.Ct. 1984) (publication of a warning letter was absolutely privileged).

[6] *See, Krasinski v. United Parcel Service, Inc.*, 124 Ill.2d 483, 530 N.E.2d 468 (1988) (statements made by supervisors informing plaintiff of charges against him and statements in a notice of termination were determined to have only a qualified privilege); *Ezekiel v. Jones Motor Co.*, 374 Mass. 382, 372 N.E.2d 1281 (1978) (defamatory statements made during joint management and union board meeting have only qualified privilege); *Bird v. Meadow Gold Products Corp.*, 60 Misc.2d 212, 302 N.Y.S.2d 701 (Sup.Ct. 1969) (defamatory statements made during grievant's adjustment conference have only unqualified privilege, but held that privilege was not abused).

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Colorado.

Respectfully submitted,

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APPENDICES

APPENDIX A

October 22, 1990

SUPREME COURT, STATE OF COLORADO

No. 89SC107

WILLARD A. THOMPSON,
Petitioner,

v.

PUBLIC SERVICE COMPANY OF COLORADO, a corporation; and R. M. RICHARDS a/k/a MARK RICHARDS,
Respondents.

Certiorari to the Colorado Court of Appeals

EN BANC
JUDGMENT REVERSED AND CASE REMANDED WITH DIRECTIONS

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JUSTICE MULLARKEY delievered the Opinion of the Court.

JUSTICE VOLLACK does not participate.

We granted certiorari to review the decision of the court of appeals in *Thompson v. Public Service Co.*, 773 P.2d 1103 (Colo. Ct. App. 1988), affirming a summary judgment against the plaintiff in a defamation action against his employer. We reject the conclusion of the court of appeals that, under federal labor law, statements made by an employer in a notice of discipline may not be the basis of a defamation action, and we reverse the decision of the court of appeals because we conclude that under state law the trial court improperly granted summary judgment on the plaintiff's claims.

I.

The plaintiff, Willard A. Thompson, was formerly an employee of the defendant, Public Service Company of Colorado (Public Service).[1] He is now retired. During the periods relevant to this dispute, Thompson's supervisor was defendant R. M. Richards; Public Service workers were represented by Local Union No. 111 of the International Brotherhood of Electrical Workers (IBEW), which had entered into a collective bargaining agreement with Public Service. Thompson in his pleadings before the district court raised two separate claims of defamation. The first claim is related to the events of November 17, 1983. On that day, Thompson and two other employees were sent to the state steam plant in Denver to perform maintenance work on the boilers in the basement. At some point, Thompson's companions left the building to retrieve supplies. Thompson thereafter left his work area and went upstairs to an area frequented by state employees. He saw a bulletin board, on which was posted a notice of a Christmas party for state employees. Thomp-

[1] Because this action was disposed of on summary judgment, we must reconstruct the factual background from the parties' pleadings, affidavits and depositions. To the extent there is a factual dispute, we defer to the allegations made by the defendant in the trial court.

son then attempted to learn who was in charge of the party so that could offer to play the piano or organ at the party. Thompson indicated in his affidavit before the trial court that, on prior occasions, persons had engaged him to provide musical services at various private functions. According to Thompson, the persons working in the area were unresponsive and he subsequently departed the area without incident.

Shortly thereafter, according to Richards, Vic Cook, a supervisor of state employees at the steam plant, telephoned Richards and told him that Thompson's contacts with state employees constituted a "nuisance." Following Cook's complaint, Richards removed Thompson from the state plant and summoned him to a meeting with Richards and the union steward, who was present because of the potential for the imposition of discipline on Thompson. According to Richards, his subsequent investigation revealed that Thompson, on November 17, 1983, was loitering about the administrative offices at the state steam plant, copying the telephone numbers and the names of the female employees. Further, Thompson allegedly asked the employees "personal questions" concerning their Christmas party and their phone numbers. Richards stated in his deposition that he believed "this unwanted attention by plaintiff toward the female employees constituted sexual harassment."

On December 6, 1983, Richards issued a letter of disciplinary suspension, informing Thompson that he was suspended for five days without pay. The disciplinary action, according to the letter, was "based on [Thompson's] poor work performance, creating a nuisance for customer employees and sexual harassment and or unwanted contact of customer employees." Copies of the suspension letter were given to Ray L. Dudley, Thompson's second-level supervisor, Ken L. Barnett, a Public Service production manager and third-level supervisor, and Public Service's Labor Relations Department. A copy of the letter

was also given to the IBEW union steward and a copy was placed in Thompson's personnel file. Pursuant to the collective bargaining agreement between Public Service and the IBEW, Thompson challenged the suspension through a "Step 1 Grievance." At the initial grievance review, Thompson was denied relief. However, upon further review [Step 2 review] on January 19, 1984, the five-day suspension was reduced to two days and the word "sexual" was removed from the discipline letter so that it merely stated "harassment." Thompson did not contest further the disciplinary action.

Thompson's second claim for defamation stemmed from a June 29, 1984 reprimand for "falsification of time card." That charge was based on Thompson's completion of a time card for June 5, 1984, as a day on which he took "sick leave." According to Richards, because Thompson failed to obtain a doctor's excuse for the sick day, and because this requirement had previously been made known to Thompson, the filing of the time card "constituted a falsification of the time card." Copies of this written reprimand were once again sent to the two higher level Public Service supervisors, as well as to the IBEW and the Public Service Labor Relations Department. A copy of the second reprimand was also placed in Thompson's personnel file. After a meeting between Thompson and his third-level supervisor Barnett, the reprimand was revised so as to delete the reference to "falsification," stating instead that Thompson's incorrect entry on his time card indicated that he "ignor[ed] the required policy procedures" and this conduct constituted "malingering." Thompson did not challenge this disciplinary action.

On December 3, 1984, Thompson filed this action in Denver District Court against Public Service and Richards, alleging defamation on the basis of the two letters of reprimand. On Public Service's motion for summary judgment, the district court ruled that Public Service's

statements in the discipline notices were protected by a qualified privilege under state law, and that because no genuine issue of fact existed concerning the question of malice, summary judgment was appropriate. The court of appeals affirmed the judgment of the trial court on a different legal theory. It held that under § 301 of the Labor Management Relations Act of 1947 (the LMRA), 29 U.S.C. § 185 (1982), statements made in written notices of discipline leading up to a grievance procedure as provided for in a collective bargaining agreement are protected by an "absolute privilege" precluding the bringing of a state law defamation claim based on such statements. *Thompson v. Public Serv. Co.*, 773 P.2d at 1106. We granted certiorari to consider whether federal labor law, under the circumstances of this case, requires the recognition of an unqualified rather than a qualified privilege, as previously recognized by this court under state law with respect to statements similar to those made here.

II.

A.

Before addressing the scope of the privilege with respect to the statements contained in the discipline notices in this case, we note that this court has already decided this issue under Colorado law, most recently in *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). In *Churchey*, we applied well-established Colorado case law in finding that the statements made by the employer Coors to the employee Churchey explaining that she had been terminated because of "dishonesty" were protected by a qualified privilege. In the face of a defendant's qualified privilege, we held that a plaintiff could recover on a defamation claim only by showing that the defendant "publishe[d] the material with malice, that is, knowing the matter to be false, or act[ed] in reckless disregard as to its veracity." *Churchey*, 759 P.2d at 1346 (*quoting Dominguez v. Babcock*, 727 P.2d 362, 366,

(Colo. 1986)). *See also Abrahamsen v. Mountain States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287 (1972) (qualified privilege applies as to inter-office memoranda); *Denver Pub. Warehouse Co. v. Holloway*, 34 Colo. 432, 83 P. 131 (1905) (qualified privilege protects the right of corporate officers to communicate with one another about their employees' conduct). *Churchey* and the earlier cases clearly establish that, under Colorado law, statements such as those made by the defendants here are protected by a qualified privilege, not by an unqualified privilege.

Thus, unless the defendants can show that federal law requires a different standard under the facts of this case, we must conclude that the statements were protected by a qualified privilege. In urging that we recognize an unqualified privilege under the facts of this case, defendants argue that to hold otherwise would "interfere with the discipline, grievance, and arbitration process contrary to federal labor policy arising under section 301 of the LMRA." However, we do not agree that § 301 supports the recognition of an unqualified privilege under federal law.

B.

The Supreme Court on a number of occasions has stated the test for determining whether § 301 "preempts" state law tort claims. Most relevant to the circumstances presented by this case is *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). The employee in that case pursued a remedy provided by the grievance procedure established under the collective bargaining agreement between her union and the company. *Lingle*, 486 U.S. at 401. Simultaneously with the grievance procedure, however, the employee filed a wrongful discharge action in state court alleging that the defendant had fired her, contrary to the public policy of the state, because she filed a worker's compensation claim. *Id.* at 402. Both the federal district court and the Seventh Circuit

Court of Appeals held that the state law claim was "inextricably intertwined" with the collective bargaining agreement and thus the state law claim was preempted. *Id.*

The Supreme Court disagreed, reaffirming its test for determining whether § 301 preempts a state tort law claim:

> [I]f the resolution of the state-law claim depends upon the meaning of the collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state law principles as there are States) is preempted and federal labor-law principles—necessarily uniform throughout the nation—must be employed to resolve the dispute."

Id. at 405-06. The court applied this test to the facts presented by *Lingle* and found that the state law claim for wrongful discharge was not preempted under § 301, even though the collective bargaining agreement in *Lingle* established a procedure for resolving claims that an employee's termination was not for just cause. *Id.* at 407. The Court held that the resolution of the Illinois wrongful discharge claim did not require the trial court to interpret any term of the collective bargaining agreement. *Id.* Thus, the state law remedy was "independent" of the collective bargaining agreement. The Supreme Court rejected the court of appeals' reasoning that the state law claim must be barred because "a state court would be deciding precisely the *same issue* as would an arbitrator: whether there was 'just cause' to discharge the worker." *Id.* at 408 (*quoting* decision below, 823 F.2d 1031, 1046 (7th Cir. 1987)) (emphasis supplied by the Supreme Court). In summary the Court concluded:

> [E]ven if the dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing

> precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 preemption purposes.

Id. at 409-10.

In support of their position that § 301 preempts Thompson's libel action here, the defendants points to a number of state and federal decisions, including *General Motors Corp. v. Mendicki*, 367 F.2d 66 (10th Cir. 1966). Most of these cases, including *Mendicki*, predate the 1988 *Lingle* decision and their continuing validity is questionable. In *Mendicki*, the court of appeals reviewed a judgment in favor of the plaintiff on his claim that a company representative had slandered him at a grievance proceeding by stating that the company had known for years that the plaintiff had been taking property from the plant. *Mendicki*, 367 F.2d at 70. The statement was made at a hearing which was part of the process for appealing a grievance under a collective bargaining agreement between the employer and the union representing the employees. *Id.* at 68. In reversing the judgment in favor of the plaintiff, the court concluded that statements made at a grievance conference are unqualifiedly privileged. The court stated:

> If the representatives of either employer or employee were subject to an action for damages because of statements made of what they claimed to be the pertinent facts respecting a controversy under consideration and of their position respecting such matter and the reasons therefor, at a conference or collective bargaining session being held to adjust such controversy, the likelihood of the attainment of peaceful adjustments on disposition of the issues involved between them through the conference or bargaining processes would be greatly decreased.

Id. at 71. The *Mendicki* court did not specifically point to § 301 as providing the basis for its holding that the employer's statements in that case were protected by an unqualified privilege. In addition, it is not clear whether the holding of "unqualified privilege" in *Mendicki* was based on state or federal law. By using the term "privilege" rather than stating that state law and jurisdiction were preempted, the court in *Mendicki* may have indicated it was applying state defamation law, not ruling that state defamation remedies were preempted. *See, e.g.*, Comment, *The Availability of Defamation Remedies for Statements Made During the Course of Labor Grievance Arbitration Proceedings*, 15 U. Kan. L. Rev. 553 (1967) (making a similar argument). Nevertheless, some subsequent cases have interpreted the *Mendicki* opinion as establishing an "unqualified privilege" under federal labor law.

In *Hasten v. Phillips Petroleum Co.*, 640 F.2d 274 (10th Cir. 1981), the court of appeals reaffirmed the validity of *Mendicki* and extended it beyond the context of the grievance proceeding to cover a letter sent by the employer to the employee informing the employee that he was being terminated for "dishonesty." *Hasten*, 640 F.2d at 275. The *Hasten* court was clear in stating its conviction that federal labor law compelled the recognition of an unqualified privilege encompassing the statements at issue:

> We are not persuaded by the plaintiff's arguments that the instant case should be distinguished from *Mendicki* or that Supreme Court decisions now dictate a contrary rule. Considering the factors identified by the Supreme Court, we remain persuaded that federal labor law and policy require the absolute privilege rule as to communications made within the context of proceedings provided for by the collective bargaining agreement and its provisions for a grievance machinery.

Id. at 278. As with the *Mendicki* decision, the court in *Hasten* did not cite § 301 as the source for the unqualified privilege.

The principle of "unqualified privilege" recognized in *Mendicki* and *Hasten* has been followed in some federal court decisions, but the courts are often imprecise in stating the basis for their holdings. *See Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057 (9th Cir. 1989) (unqualified privilege protects statements made in employer's notice of intent to discipline); *Hyles v. Mensing*, 849 F.2d 1213 (9th Cir. 1988) (federal labor policy and federal labor law require recognition of privilege so as to bar state defamation claims based on statements made in grievance proceedings); *Hull v. Central Transp., Inc.*, 628 F. Supp. 784 (N.D. Ind. 1986) (statements made in grievance proceedings are absolutely privileged, apparently under § 301 of LMRA); *Green v. Hughes Aircraft Co.*, 630 F. Supp. 423 (S.D. Cal. 1985) (statements in employer's initial discipline report stating that plaintiff employee had stolen a sandwich protected by absolute privilege); *Brooks v. Solomon Co.*, 542 F. Supp. 1229 (N.D. Alabama 1982) (absolute privilege for statements made at grievance hearing). *Accord, Surrency v. Harbison*, 489 So. 2d 1097 (Ala. 1986); *Louisville & Nashville R.R. Co. v. Marshall*, 586 S.W.2d 274 (Ky. Ct. App. 1979). Other federal cases specifically have held that § 301 preempts state law defamation claims. *See Willis v. Reynolds Metals Co.*, 840 F.2d 254 (4th Cir. 1988) (employee's state law claim that personnel manager slandered her during informal discipline meeting preempted by § 301); *Seid v. Pacific Bell, Inc.*, 635 F. Supp. 906 (S.D. Cal. 1985) (§ 301 preempts state claim for defamation based on statements made in investigation subject to collective bargaining agreement).

Some state courts which have recognized an absolute privilege either have done so under state law or have been unclear whether their recognition of the privilege was

under state or federal law. *See Petyan v. Ellis*, 200 Conn. 243, 510 A.2d 1337 (1986); *Rougeau v. Firestone Tire & Rubber Co.*, 274 So. 2d 454 (La. Ct. App. 1973); *Fulghum v. United Parcel Serv.*, 424 Mich. 89, 378 N.W.2d 472 (1985); *Turner v. Gateway Transp. Co.*, 569 S.W.2d 358 (Mo. Ct. App. 1978); *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985); *Agriss v. Broadway Express, Inc.*, 334 Pa. Super. 295, 483 A.2d 456 (1984). *See also* Annotation, *Libel and Slander: Privileged Nature of Communications Made in Course of Grievance or Arbitration Procedure Provided for by Collective Bargaining Agreement*, 60 A.L.R.3d 1041 (1974).

Other courts, however, have not agreed that federal labor law requires an absolute privilege to be granted to statements made in the course of a grievance proceeding or in related written documents and oral discussions. State courts in New York, Massachusetts, Illinois and Ohio have rejected the holdings of *Mendicki* and *Hasten*. In *Bird v. Meadow Gold Products Corp.*, 60 Misc. 2d 212, ——, 302 N.Y.S.2d 701, 704-705 (N.Y. Sup. Ct. 1969), the court rejected the reasoning of *Mendicki* and applied principles of qualified immunity under New York law even though the plaintiff employee claimed that his employer had slandered him in the course of a conference held pursuant to a collective bargaining agreement between his union and his employer. The Supreme Judicial Court of Massachusetts in *Ezekiel v. Jones Motor Co.*, 374 Mass. 382, 372 N.E.2d 1281 (1978), agreed with the New York court's opinion in *Bird* and held that a qualified privilege applied to statements made in the course of a grievance procedure covered by a collective bargaining agreement. The court stated:

> We prefer the approach taken in *Bird v. Meadow Gold Prod. Corp., supra*, where the New York court rejected the *Mendicki* rationale and held that allegedly defamatory statements were qualifiedly privileged when made at a conference pursuant to a col-

> lective bargaining agreement. The court found no congressional legislation specifically governing defamatory actions predicated on statements made during a labor grievance proceeding nor prohibiting a State court from regulating conduct in a manner consistent with national labor policies.

Ezekiel, 374 Mass. at ——, 372 N.E.2d at 1285. The court went on to hold that the policy concerns raised by the Tenth Circuit Court in *Mendicki* were sufficiently safeguarded by applying principles of qualified privilege stating:

> While the defendants do not clearly argue that this slander action in the State court is preempted by Federal labor legislation, they do urge that they should be immune from liability to avoid frustrating the policies expressed in this Federal labor legislation. Protecting its residents from slander has long been a concern of the Commonwealth. A grant of the conditional privilege provides a sufficient safeguard against the dampening of free discussion of the pertinent facts important to the peaceful adjustment of grievances.

Ezekiel, 374 Mass. at ——, 372 N.E.2d at 1286. *Accord Fisher v. Illinois Office Supply Co.*, 130 Ill. App. 3d 996, 474 N.E.2d 1263 (1984); *see also Bailey v. Sams*, 24 Ohio App. 3d 137, 493 N.E.2d 966 (1985).

In our view, § 301 does not preempt Thompson's state law defamation claims. Here, as in *Lingle*, the resolution of the state law claims does not require the interpretation of the collective bargaining agreement. Each element of Thompson's case may be resolved without reference to the collective bargaining agreement. Moreover, this case presents a stronger case for permitting the state law action than *Lingle*. In *Lingle* the grievance proceeding and the wrongful discharge action decided, arguably, precisely the same issue: whether termination of the em-

ployee was proper. In contrast, a grievance proceeding like the one involved in this case does not necessarily decide the truth of the matters asserted in a letter of discipline, but in many instances may focus narrowly on the appropriateness of the particular discipline imposed.

The determinations in the grievance proceedings here, that the notices should be modified to change "sexual harassment" to "harassment" and to delete the reference to "falsification" of a time card, did not necessarily resolve the merits of the accuracy of these accusations. Rather, the changes may reflect a compromise entered into simply to resolve a dispute between an employee represented by a union and management. In any event, there was not a specific finding made as to the truth or falsity of the accusations made in the notices of discipline. To hold that a grievance is the sole remedy of an employee allegedly libeled by an employer would unjustly limit the employee's ability to remedy damage to his reputation. The collective bargaining agreement simply provides no mechanism for vindicating an employee's interest in protecting his good name from unjustified, knowingly false accusations of serious misconduct.

C.

We also reject the contention that an unqualified privilege is required under the rubric of "national labor policy." No United States Supreme Court decision has so held and, to the contrary, existing Supreme Court precedent suggests that a qualified privilege suffices.

In support of its holding recognizing the unqualified privilege, the Tenth Circuit Court of Appeals in *Hasten* explained its earlier *Mendicki* decision by stating that the recognition of the unqualified privilege was required because "the libel action would clearly call for adjudication of the merits of the allegations of dishonesty which were the core issue in the grievance proceeding." *Hasten*, 640

F.2d at 279. However, as noted above, this reasoning is undercut by the Supreme Court's decision in *Lingle* permitting a wrongful discharge claim to go forward in state court even though, under the terms of a collective bargaining agreement, a grievance procedure was established for determining whether an employee had been discharged for "just cause."

Moreover, the "qualified privilege" standard articulated by this court in *Dominguez* and *Churchey* is virtually indistinguishable from the standard approved by the Supreme Court in *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974), and *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966). In *Linn*, the Court held that federal labor law permits the maintenance of a state law libel action by an official of an employer against a union for statements made during an organizing campaign. *Linn*, 383 U.S. at 55. The Court recognized that the state had an "overriding state interest" in protecting its residents from malicious libels. *Id.* at 61. The Court acknowledged that, to some extent, permitting the state law actions would conflict with the policies of the National Labor Relations Act, 29 U.S.C. § 141 *et seq.* (1964 ed.), of encouraging free debate. *Id.* at 64. However, the Court held that this risk could be minimized by allowing recovery on a state libel law action only if the plaintiff proves that the defendant acted with "malice" as defined by the Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *Id.* at 65. In *Letter Carriers*, the Court reaffirmed its holding that a plaintiff could recover in a state libel law action in the labor dispute context only by proving that a defamatory publication was made with "knowledge of falsity or reckless disregard of the truth." *Letter Carriers*, 418 U.S. at 281.

The federal interest in free debate in the labor dispute context would seem to be quite similar to the federal interest in encouraging frank discussion in the context of

a grievance proceeding or a disciplinary action. The federal interest in maintaining a national labor policy is adequately safeguarded by requiring that the plaintiff, in order to recover in a defamation action based upon statements made in a grievance proceeding, prove that the dafamatory statements were made with knowledge of their falsity or with reckless disregard for whether or not they were true or false. Thus, we hold that a state law defamation action based upon statements made in a grievance or disciplinary proceeding may go forward when the state law recognizes a qualified privilege for communications made in the course of the disciplinary or grievance proceedings.

III.

Finally, we must consider whether summary judgment was proper here on Thompson's state law claim. In making this determination, we are guided by this court's decision in *Churchey*, 759 P.2d 1336. In *Churchey*, as here, the district court granted summary judgment against an employee on her defamation claim against her employer. *Churchey*, 759 P.2d at 1338. In *Churchey*, the plaintiff claimed that her employer libeled her by stating that the reason for her discharge was "dishonesty." *Id.* at 1341. In addressing the question of whether summary judgment was proper in that case, we engaged in a useful review of the relevant principles governing summary judgment. We stated:

> Summary judgment is a drastic remedy and is never warranted except on a clear showing that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party has the burden of establishing the lack of a triable factual issue, and all doubts as to the existence of such an issue must be resolved against the moving party. The party against whom summary judgment is sought is entitled to the benefit of all favorable inferences that

> may be drawn from the facts. The same standards should be applied by an appellate court reviewing a summary judgment order.

Id. at 1339-40 (citations omitted). Thus, as in *Churchey*, we must determine whether the defendants met their burden of proving that there are no relevant issues of material fact and that Public Service and Richards are entitled to judgment as a matter of law on Thompson's defamation claims.

To prove a claim for defamation against an employer a plaintiff must show that the employer published a false statement of defamatory fact. *Id.* at 1341. If the communication is protected by a "qualified privilege," then the plaintiff may recover only if he proves that the defendant "publishe[d] the material with malice, that is, knowing the matter to be false, or act[ed] with reckless disregard as to its veracity." *Id.* at 1346 (citations omitted). According to *Restatement (Second) of Torts*, "[r]eckless disregard exists when there is a high degree of awareness of probable falsity or serious doubt as to the truth of the statement." *Restatement (Second) of Torts* § 600 comment b (1977). Here, the trial court properly ruled that Richards' statements were protected by a qualified privilege.

In support of their motion for summary judgment, the defendants filed with the trial court a number of affidavits as well as excerpts from depositions. Defendant Richards' affidavit described his view of the circumstances surrounding the alleged incident of sexual harassment stating:

> I suspended Plaintiff for his conduct on November, 17, 1983 because, as I was told, he had been loitering around the State Administrative Offices, he had been copying the telephone numbers and names of the State female employees from the desk name plates, and he had been interrupting the female employees

> with personal questions concerning their Christmas parties and asking for their telephone numbers. I believe this unwanted attention by the Plaintiff toward the female employees constituted sexual harassment.

Richards also stated his basis for charging the defendant with falsification of a time card, stating:

> I reprimanded Plaintiff for his conduct in June 1984 when he asserted on his time card that he was on paid sick leave for June 5, 1984 when in fact he had not procured the required doctor's authorization to be authorized sick leave.

Finally, Richards stated:

> At the time, I disciplined Plaintiff for sexual harassment and falsification of his time card I believed that he had committed those acts and still so believe. I held no ill will toward Plaintiff before, during or as a result of the discipline I imposed upon him.

Thompson filed an affidavit in which he denied both the allegations of sexual harassment and falsification of the time card and presented a detailed version of the facts that was substantially different from Richards' version of the two incidents. Thompson also alleged in his affidavit that the charges "were part of an ongoing series of incidents and conduct on the part of Richards which clearly showed to me that he had malicious motives with regard to me."

In addition, Vic Cook, the supervisor who phoned Richards to complain about Thompson's conduct toward the state employees, never complained that Thompson's conduct constituted sexual harassment. Cook's letter to Richards described Thompson as a "nuisance." Richards testified in his deposition that Cook *implied* that Thompson had sexually harassed female employees, but Richards acknowledged in his deposition that he was unable to

substantiate his charge of sexual harassment by reports from the alleged victims, although he made numerous requests for such substantiating reports. Finally, with respect to the charge of falsifying his time card, Thompson alleged in his affidavit that Richards' superior, Kenny Barnett, labelled the charge "ridiculous" and marked the reprimand "void."

Giving Thompson the benefit of all favorable inferences that may be drawn from these facts, as we are compelled to do, we conclude that Thompson has demonstrated that a genuine issue of fact exists with respect to whether Richards knew of the falsity of his statements or acted with reckless disregard as to the falsity of his statements contained in the letters in question.

Accordingly, we reject the court of appeals' analysis and we reverse its judgment upholding the trial court's order granting summary judgment for the defendants. The court of appeals is directed to remand the case for trial on Thompson's defamation claims.

JUSTICE VOLLACK does not participate.

APPENDIX B

COLORADO COURT OF APPEALS

No. 87CA0777

WILLARD A. THOMPSON,
Plaintiff-Appellant,
v.
PUBLIC SERVICE COMPANY OF COLORADO, a corporation; and R. M. RICHARDS, a/k/a MARK RICHARDS,
Defendants-Appellees.

Appeal from the District Court of the City and County of Denver

No. 84CV12173

HONORABLE DANIEL B. SPARR, Judge

[Opinion filed and judgment entered on the 15th day of December, 1988]

JUDGMENT AFFIRMED

DIVISION III
Opinion by JUDGE CRISWELL
VAN CISE and STERNBERG, JJ., concur

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Attorneys for Defendants-Appellees

Plaintiff, Willard A. Thompson, appeals the summary judgment that dismissed his libel action against defendants, Public Service Company (PSC) and R. M. Richards, a PSC supervisor. The trial court entered the judgment because it concluded that defendants possessed a qualified privilege to publish the statements involved and that the undisputed evidence demonstrated that that privilege had not been abused. In the circumstances portrayed by this record, we conclude that the federal labor policy, as reflected in the applicable federal statutes, requires the recognition of an absolute privilege for defendants' statements. Thus, we affirm.

Plaintiff was employed by PSC in a collective bargaining unit of employees whose exclusive bargaining representative for purposes of the National Labor Relations Act, 29 U.S.C. § 151, et seq. (1982), was Local Union No. 111 of the International Brotherhood of Electrical Workers (IBEW). PSC and IBEW were parties to a collective bargaining agreement that governed the wages, hours of work, and other terms and conditions of employment for the employees within the bargaining unit, including plaintiff.

This agreement recognized PSC's right "to suspend, to discharge, or to discipline [employees] for proper cause," subject, however, to a disciplined employee's right to adjust any grievance relating to any discipline in accordance with the procedures described in the agreement. Under the agreement, the initial means for resolution of a grievance was to be by informal discussions between an employee and his immediate supervisor. If the dispute was not resolved in that manner, then a formal four-step procedure was followed. That procedure began with discussions between IBEW representatives and lower management representatives, progressed through discussions between higher level representatives, and culminated, if necessary, in binding arbitration.

In November 1983, plaintiff was sent to do maintenance work upon boilers that were located in the basement of a building. While waiting for other PSC employees to arrive at the building, plaintiff left the basement area, went to another floor, and attempted to speak with several female clerical employees who worked for another employer. This activity resulted in a supervisor of the clerical employees telephoning plaintiff's supervisor and complaining about plaintiff's activities. Plaintiff returned to PSC's premises and attended a meeting with his supervisor and an IBEW representative to discuss what had occurred.

After this conference, plaintiff was given a written notice that he was to be suspended from his job without pay for five days. This notice reviewed previous disciplinary actions taken against plaintiff for other incidents and asserted that the present suspension was being imposed because of his "creating a nuisance for customer employees and *sexual harassment* and/or unwanted contact of customer employees." (emphasis supplied) A copy of this notice was provided to IBEW, to plaintiff's second and third level supervisors, and to PSC's labor relations department, and a copy was placed in plaintiffs' personnel file. There was no competent evidence submitted to the trial court that PSC furnished any other person with a copy of this notice.

Plaintiff invoked the contract's formal grievance procedures to protest this suspension and, at the second step, the matter was considered and resolved by a joint union-management committee, consisting of three PSC representatives and three IBEW representatives. Both plaintiff and his immediate supervisor were present as witnesses and a member of PSC's labor relations staff was also present as an observer. After considering the matter, it was agreed that plaintiff's grievance would be finally settled by reducing his suspension from 5 days to 2 days and by removing the word "sexual" from the written

notice previously issued to him. In return, plaintiff agreed that he would receive counseling through one of PSC's internal employee assistance programs.

Approximately eight months later, plaintiff was absent from work because of an illness. PSC's working rules required such an absent employee to present a physician's statement attesting to his illness upon his return to work. Plaintiff failed to provide such a statement, and he marked his time card for the period of his absence as "sick leave," which would have resulted in his being paid during his absence.

As a result of this incident, a "written reprimand" was issued to plaintiff in a form similar to his previous notice of suspension. This document noted that plaintiff had failed to comply with PSC's requirement for a doctor's statement on previous occasions and that he had been told that a future infraction of that rule would result in his failure to be paid for his absence. It concluded that, under these circumstances, plaintiff's marking of his time card in the manner in which he did constituted a "falsification" of that time card. A copy of this written reprimand was provided to the same parties as were provided copies of the previous notice of suspension. Again, there was no evidence presented that anyone else received a copy of this reprimand.

It is not clear whether plaintiff invoked the contract's formal grievance procedures to protest this written reprimand or whether he undertook to adjust his objection to it in an informal matter. In any event, he contacted his third level supervisor, who would have been involved in any formal grievance proceeding, and that supervisor directed that an amended letter of reprimand be issued to plaintiff to remove any reference to a falsification of his time card.

Plaintiff's complaint in libel contained two claims, based upon these two written notices. The trial court

concluded, however, that the two statements upon which plaintiff relied to establish actionable defamation were each subject to the qualified privilege that attaches to job-related statements made by an employer about an employee. *See Dominguez v. Babcock*, 727 P.2d 362 (Colo. 1986); *Price v. Conoco, Inc.*, 748 P.2d 349 (Colo. App. 1987). It also concluded that the undisputed facts demonstrated that the statements were not made with a knowledge of their falsity or with a reckless disregard thereof, *see Dominguez v. Babcock, supra*, and that they were not published to persons outside the interested group. *See Patane v. Broadmoor Hotel, Inc.*, 708 P.2d 473 (Colo. App. 1985).

Plaintiff argues that his evidence showed that his supervisor made each statement without conducting a sufficient investigation, so that a reasonable inference could be drawn that that supervisor had acted with a reckless disregard of the truth of those statements, thereby rendering summary judgment inappropirmate. However, because we conclude that the statements were subject to an absolute privilege and that the evidence demonstrates that that privilege was not abused, we affirm the trial court's judgment without passing upon the question of the existence of malice under *Dominguez v. Babcock, supra.*

When Congress adopted § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1982), it granted jurisdiction to the federal courts to adjudicate claimed violations of collective bargaining agreements. While perhaps not evident on its face, § 301 contains a mandate to the federal courts to fashion a body of federal law applicable to union contracts. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957). Moreover, the state courts must apply the tenets of the substantive federal law developed under § 301 to the exclusion of any inconsistent state law that might otherwise be applicable. *Teamsters Local No. 174*

v. Lucas Flour Co., 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962); *Digby v. Denver*, 156 Colo. 260, 398 P.2d 30 (1965).

One of the basic principles of the federal law relating to union contracts is that, where such a contract contains a provision that calls for the reference of disputes arising under its terms to binding arbitration, courts lack jurisdiction to intervene in such disputes. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965); *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960). Thus, where the parties have committed disputes relating to the interpretation of a bargaining agreement to the jurisdiction of an arbitrator, no state may authorize the assertion of a state law claim, whether grounded in contract or in tort, that would require an interpretation or application of the terms of that agreement by a tribunal other than the arbitrator. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985).

If an alleged libel takes the form of a statement by an employer to justify the imposition of discipline upon an employee under a union contract, and the question of the propriety of that discipline may be made the subject of binding contractual grievance and arbitration procedures, those procedures must necessarily result in the consideration and resolution of the issues of the truth of the statement made and the propriety under the contract of the discipline imposed. Further, the underlying purposes of such grievance and arbitration procedures require that the parties to those procedures be encouraged to engage in a full, free, and frank discussion of their positions. *See General Motors Corp. v. Mendicki*, 367 F.2d 66 (10th Cir. 1966).

For these and similar reasons, it has been held that the national labor policy requires the recognition of an

absolute privilege for any statements that are germane to the subject made to persons involved in contractual grievance proceedings under a collective bargaining agreement. And, this privilege extends both to those statements made during conferences or hearings conducted pursuant to those proceedings, *General Motors Corp. v. Mendicki, supra*, and to written notices of discipline which "trigger" the initation of such proceedings. *Hasten v. Phillips Petroleum Co.*, 640 F.2d 274 (10th Cir. 1981). *Accord Surrency v. Harbison*, 489 So. 2d 1097 (Ala. 1986); *Aubuschon v. Internaitonal Mill Service*, 167 Ill. App. 3d 965, 522 N.E.2d 898 (1988); *Louisville & Nashville Ry. Co. v. Marshall*, 586 S.W.2d 274 (Ky. App. 1979); *Rougeau v. Firestone Tire & Rubber Co.*, 274 So. 2d 454 (La. App. 1973); *Fulghum v. United Parcel Service*, 424 Mich. 89, 378 N.W.2d 472 (1985); *Turner v. Gateway Transportation Co.*, 569 S.W.2d 358 (Mo. App. 1978); *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985) (equating statements in grievance proceedings to statements in judicial proceedings); *Neece v. Kantu*, 84 N.M. 700, 507 P.2d 447, 60 A.L.R.3d 1030 (N.M. App. 1973); *Bailey v. Sams*, 24 Ohio App. 3d 137, 493 N.E.2d 966 (1985); *Agriss v. Roadway Express Co.*, 483 A.2d 456 (Pa. Super. 1984). *Contra Tellez v. Pacific Gas & Electric Co.*, 817 F.2d 536 (9th Cir. 1987) (if contract does not require notice of discipline to be placed in writing, only qualified privilege recognized), *cert. denied*, —— U.S. ——, 108 S.Ct. 251, 98 L.Ed.2d 209 (1987); *Ezekiel v. Jones Motor Co.*, 374 Mass. 382, 372 N.E.2d 1281 (1978) (qualified privilege); *Bird v. Meadow Gold Products Corp.*, 60 Misc. 2d 212, 302 N.Y.S.2d 701 (1969) (qualified privilege).

In this case, the written notice, in each instance, described the nature of the discipline being imposed upon plaintiff, set forth the employer's reasons which it considered to be the "proper cause" for the discipline, and gave the effective date of the employer's action. While

there is no evidence that the contract *required* such a written notification, the contract also does not prohibit the notice of discipline from being placed in written form. Indeed, since the contract requires the employer to demonstrate "proper cause" for any discipline imposed and sets a time limit for the employee to invoke the grievance procedure, the issuance by PSC of a written notice, in lieu of reliance upon an oral statement of a supervisor, lessens the possibility of misunderstanding among the parties and increases the degree of industrial due process that a disciplined employee is accorded. In light of the purposes to be served by a recognition of an absolute privilege for such statements, the fact that the pertinent contract does not require a written statement by the employer is, in our view, of little relevance. But *compare Hasten v. Phillips Petroleum Co., supra, with Tellez v. Pacific Gas & Electric Co., supra.*

In addition, the undisputed evidence also demonstrates that PSC did not abuse its absolute privilege. In *Patane v. Broadmoor Hotel, Inc., supra*, it was held that an employer had a qualified privilege to publish to all co-employees the reasons for the termination of an employee, since all employees shared a common interest in information relating to the "turnover or status of personnel." *Accord Denver Public Warehouse Co. v. Holloway*, 34 Colo. 432, 83 P. 131 (1905). *See* Restatement of Torts (Second) § 596 (1979).

However, the absolute privilege recognized here exists among a substantially smaller group. In order to preserve this privilege, the statement's publication must be limited to those persons who have a direct interest in the subject of the dispute or in the labor-management functions involved in the contractual procedures. *See Hasten v. Phillips Petroleum Co., supra.*

Here, PSC limited the publication of the notices to plaintiff and his collective bargaining agent, its labor

relations staff, and supervisors who would become involved in the grievance proceedings if plaintiff elected to invoke those procedures. Each of the persons receiving the notices had a legitimate job-related interest in the dispute or in any future grievance proceedings that might be scheduled. Thus, the absolute privilege that the national labor policy requires to be recognized was not abused here.

Judgment affirmed.

JUDGE VAN CISE and JUDGE STERNBERG concur.

APPENDIX C

DISTRICT COURT
CITY AND COUNTY OF DENVER
STATE OF COLORADO

Civil Action No. 84 CV 12173, Courtroom 2

WILLARD A. THOMPSON,
Plaintiff,

v.

PUBLIC SERVICE COMPANY OF COLORADO, *et al.*,
Defendants.

ORDER

THIS MATTER comes on on Defendants' Motion for Summary Judgment. The Court has reviewed the briefs and heard the arguments of counsel and now makes the following findings of fact, conclusions of law and order.

The Plaintiff's complaint alleges two claims for relief. These claims are based upon alleged libels occuring while the Plaintiff was employed by the Defendant. The statements occurred in the context of disciplinary actions against the Plaintiff.

The Defendants' Motion for Summary Judgment states that the statements made during the grievance and disciplinary proceeding are absolutely privileged under federal law and qualifiedly privileged under state law.

The Court does not need to address the issues raised under federal law since the qualified privilege that exists under Colorado State law applies.

The Plaintiff argues that this privilege does not apply since the published statements were actuated by actual malice. A review of the exhibits and deposition excerpts shows no genuine issue of fact concerning the question of malice. The statements made by the Defendant were not made with actual malice. See *Abrahamsen v. Mountain States Telephone & Telegraph*, 177 Colo. 422, 494 P.2d 1287 (1972).

Accordingly, the Defendants' Motion for Summary Judgment is granted.

DATED April 14, 1987

BY THE COURT

/s/ Daniel B. Sparr
DANIEL B. SPARR
District Court Judge

cc: JOSEPH P. GENCHI, ESQ.
DAVID W. KERBER, ESQ.

APPENDIX D

DISTRICT COURT
CITY AND COUNTY OF DENVER
STATE OF COLORADO

Civil Action No. 84 CV 12173, Courtroom 2

WILLARD A. THOMPSON,

Plaintiff,

v.

PUBLIC SERVICE COMPANY OF COLORADO,
a Colorado corporation, and
R. M. RICHARDS a/k/a R. MARK RICHARDS,

Defendants.

MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS PUBLIC SERVICE COMPANY OF COLORADO AND R. M. RICHARDS A/K/A MARK RICHARDS

Defendants, Public Service Company of Colorado and Mark Richards hereby move this Court to grant summary judgment pursuant to Rule 56(b), Colorado Rules of Civil Procedure, upon the following grounds:

1. Plaintiff's claims for relief which are based upon alleged libel occurring in an employer/employee context where the employee is covered by a collective bargaining agreement are preempted by federal labor law. Where a state cause of action is preempted by federal labor laws, it is a challenge to the Court's subject matter jurisdiction and can be raised at any time. *International Longshoremen's Assoc. v. Davis*, 476 U.S. ——; 90 L.Ed.2d 389 (1986).

2. There is no genuine issue as to any material fact and Defendants are entitled to a judgment as a matter of law.

3. The Court is referred to Defendants' Brief in Support of their Motion for Summary Judgment, affidavits and exhibits attached thereto which is incorporated herein by reference.

Respectfully submitted,

KELLY, STANSFIELD & O'DONNELL

By: /s/ David W. Kerber
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Attorneys for Defendants

DATED: October 14, 1986

CERTIFICATE OF MAILING

I hereby certify that on this 14th day of October, 1986, a true and correct copy of the foregoing MOTION FOR SUMMARY JUDGMENT BY DEFENDANT was placed in the U.S. mail, postage prepaid, and addressed to:

JOSEPH P. GENCHI, ESQ.
JOSEPH P. GENCHI, P.C.
302 E. Elkhorn Ave.
P.O. Box 1990
Estes Park, Colorado 80517

/s/ Karen L. Harr